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In The
SUPREME COURT OF THE UNITED STATES
October Term 1964.

No. 281.

FRANK W. WICKER,
Petitioner,

v.

NATIONAL SURETY CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

AUBREY R. BOWLES, JR.
H. ARMISTEAD BOYD
901 Mutual Building
Richmond, Virginia 23219
Attorneys for Respondent

BOWLES, BOYD and HIRSON
901 Mutual Building
Richmond, Virginia 23219
Of Counsel

ABBREVIATIONS

Peto.—The Petition for Certiorari

Peto. App.—The Appendix with the Petition for Certiorari

DA—Appendix to Brief of Defendant-Appellant filed by Petitioner with the Petition for Certiorari

PX—Designation of Plaintiff's Exhibits in District Court

DX—Designation of Defendant's Exhibits in District Court

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BRIEF OF RESPONDENT IN OPPOSITION

THE PETITION FOR CERTIORARI STATES NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI IN THIS CASE

Respondent, National Surety Corporation, respectfully submits that the petitioner has stated no special or important reason calling for the Court to exercise its discretion to grant certiorari in this case:

1. Because the questions involved, though important to the parties themselves in the application of Virginia Statutes to the particular undisputed facts of this case, are not of such national and public importance as to demand the exercise of that discretion.

2. Because the Court of Appeals for the Fourth Circuit has correctly applied the statutory law of Virginia as interpreted by its highest court, the Supreme Court of Appeals of Virginia, to the particular undisputed facts of this case and its decision is not in conflict with applicable state law.

THE FACTS

Both the District Court and the Court of Appeals found that the facts material to the issues were not in dispute.[1] Those facts are:

The dealer, Commonwealth Ford, Inc., sold an automobile to one Joseph F. White. According to universally recognized custom the purchaser, White, signed a buyer's purchase order (PX 1; DA 34, 15) and a credit application (PX 7; DA 35-6, 3). The purchaser also signed *in blank* a title application (PX 5), a conditional sale contract (DX 5), paid the dealer the $1.00 transfer fee required to be paid by the purchaser to the Division of Motor Vehicles for a new title certificate, received temporary license tags upon the execution by him of a Temporary Registration Certificate (PX 3) on the form provided by the Division of Motor Vehicles, and paid the further fee of $1.00 required for the issuance of the temporary license tags DA 43-4, 46, 39-40).

It was agreed between the dealer and the purchaser that all of the documents, "such as were necessary to be taken",

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[1] *Opinion of District Court* (Petition, Appendix, p. 1): "There is no serious dispute about the material facts." *Opinion of Court of Appeals* (330 F. 2d 1009, 1010; Petition, Appendix, p. 12): "There is no substantial dispute as to the facts. The issue is one of law."

would be taken by the dealer on behalf of the purchaser to the Division of Motor Vehicles (DA 20, 41, 43). It was also agreed that the purchaser, White, would later pick up the new registration card from the dealer after the dealer had obtained it for him from the Division of Motor Vehicles (DA 41).

All of the necessary papers were completed and fully executed on December 21, 1961. They were then placed by the dealer in the customary channels for delivery on December 22, 1961, by messenger to the Division of Motor Vehicles but the offices of the Division closed for the Christmas holidays at noon on December 22, 1961, and did not reopen until 8:30 a.m. on December 27, 1961. The papers were not delivered to the Division until the forenoon of December 27, 1961. The accident by reason of which petitioner obtained his default judgment occurred on December 24, 1961 (DA 5).

The District Court found as a fact: (1) that the assignment of the certificate of title by the dealer to the purchaser, as well as the execution of all the other papers relating to the transaction, was fully accomplished on December 21, 1961; (2) that all of the papers necessary to the transfer of title were then held by the dealer pursuant to its statement to the purchaser that the dealer "would send the papers to the Division of Motor Vehicles, and that he [the purchaser] could stop by the corporation's office and pick up his registration card at a later date"; (3) that "This arrangement was agreeable to him" (the purchaser); (4) that the handling of the transaction was done in accordance with the customary practices of about 80% of the dealers in the vicinity of Richmond; and (5) that dealers transmitted about 80% of all title papers received from

all sources by the Motor Vehicle Division (DA 4-6; Petition, Appendix, pp. 2-4).

THE ISSUES

The basic issue is: was the dealer the owner of the motor vehicle on December 24, 1961, with power to grant permission for its use so that such use was covered by the omnibus clause of the dealer's policy?

Both the District Court and the Court of Appeals agreed that under Virginia law as interpreted by the Supreme Court of Appeals of Virginia the assignment and delivery by the seller to the purchaser of the certificate of title constituted transfer of ownership, whether the seller be an individual or a dealer (Peto. App. 5; Peto. App. 16-17).

The District Court recognized that constructive delivery of the assigned certificate would transfer title and that physical delivery was not necessary (Peto. App. 5) but decided that there was no constructive delivery in this case (Peto. App. 10-11).

The Court of Appeals reversed on the ground that there was actual delivery of the reassigned certificate of title prior to the accident because the seller held the papers necessary to the transfer of title as agent of the purchaser for transmittal to the Division of Motor Vehicles on the purchaser's behalf (Peto. App. 12-13, 17-18).

The decision of the Court of Appeals for the Fourth Circuit was in exact accord with the decisions of the Supreme Court of Appeals of Virginia.

THE QUESTION INVOLVED DOES NOT PRESENT THE IMPORTANCE FOR WHICH CERTIORARI HAS HERETOFORE BEEN GRANTED

It cannot be denied that the issue considered by the District Court and the Court of Appeals for the Fourth Circuit was and is of material importance to the parties to this litigation. It does not, however, involve any federal question or federal law. There is no conflict of opinion between federal Courts of Appeal.

The case is one merely of the application of local law to a local situation on the special undisputed facts of a particular case between individual parties. It has no public importance and clearly does not affect the national interest in either its internal or external relations.

In such case it has not been the custom of this Court to grant certiorari. On the contrary the Court has frequently, even after oral argument on the merits, dismissed the writ of certiorari as improvidently awarded. *S. S. Monrosa v. Carbon Black Export, Inc.* (1959), 359 U.S. 180, 3 L.Ed. 2d 723, 79 S.Ct. 710; *Rudolph v. U. S.* (1962), 370 U.S. 269, 8 L.Ed. 2d 484, 82 S.Ct. 1277; *Layne & Bowler Corp. v. Western Well Works, Inc.* (1923), 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422; *Rice v. Sioux City Cemetery, Inc.* (1954), 349 U. S. 70, 79, 99 L.Ed. 897, 904, 75 S.Ct. 614; *Bentsen v. Blackwell* (1954), 347 U.S. 925, 98 L.Ed. 1078, 74 S.Ct. 527; *Hallahan v. Eureka Pipe Line Co.* (1923), 261 U.S. 387, 397, 67 L.Ed. 712, 718, 43 S.Ct. 422; *Huddleston v. Dwyer* (1944), 322 U.S. 232, 237, 88 L.Ed. 1246, 1249, 64 S.Ct. 1015; *Spiegel's Estate v. Commissioner* (1949), 335 U.S. 701, 708, 93 L.Ed. 330, 338, 69 S.Ct. 301.

It should also be noted that the plaintiff chose the forum and, had he doubted the capacity of the Court of Appeals for the Fourth Circuit to apply correctly the Virginia law, he could at least have tried to avoid that risk by proceeding originally in the state courts.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH VIRGINIA LAW

Petitioner contends that the Court of Appeals for the Fourth Circuit has ignored the mandatory requirements of Sect. 46.1-90, Va. Code, 1950, and that there is no Virginia state court decision interpreting that statute. (Peto. 7, 5). Petitioner is in error in both respects.

Petitioner relies upon *Thomas* v. *Mullins* (1929), 153 Va. 383, 149 S.E. 494, for the proposition that the provisions of the motor vehicle registration act adopted by the Virginia General Assembly of 1926 are mandatory. Sect. 19 of that act provided for immediate notice to the Motor Vehicle Commissioner of the transfer of a motor vehicle by a manufacturer or dealer to any person other than a manufacturer or dealer, upon forms provided by the department on which must be shown the date of transfer, the names and addresses of both transferer and transferee and a description of the vehicle transferred. The pertinent parts of the statute are quoted in the reported opinion, 153 Va., at p. 387, 149 S.E., at p. 495. The 1926 act also provided in Sects. 10 and 11, also quoted in the opinion, for the registration of motor vehicles and for certificates of title thereto which would contain thereon provision for the "assignment of title or interest", 153 Va., at p. 388, 149 S.E., at p. 496.

Sect. 46.1-90, Va. Code, 1950 (Peto. App. 21) is similar in its general provisions to those of Sect. 19 of the 1926 act except that *immediate* notice of the transfer was required by the 1926 act while the present statute *does not specify any time* within which such notice of the transfer shall be given.

Nevertheless, as pointed out by the District Court (Peto. App. 5), the writer of the opinion in *Thomas* v. *Mullins*, stated that in order to complete the transfer of a motor vehicle the seller must "conform to the statutory requirement" by delivering to the buyer a proper assignment of title." 153 Va. at p. 391, 149 S.E., at p. 497.

That express language was quoted by the Virginia Court in *Sauls* v. *Thomas-Andrews & Co.* (1934), 163 Va. 407, 415, 175 S.E. 760, 763, where the failure of the seller to deliver a duly assigned certificate of title was said to preclude the transfer of title and prevent creditors of the buyer from seizing the vehicle.

Again in *Nationwide Ins. Co.* v. *Storm* (1959), 200 Va. 526, 528, 106 S.E. 2d 588, 589, the Virginia Court said that "in order to complete the sale upon his part it is essential that the seller conform to the statutory requirement by delivering to the purchaser a proper assignment of title".

It is obvious from the decisions that delivery by the seller to the buyer of a properly executed assignment of the certificate of title is the criterion in Virginia for the transfer of title to a motor vehicle, just as it is settled that the execution and delivery of a deed passes title to real estate *Payne* v. *Payne* (1920), 128 Va. 33, 104 S.E. 712.

Petitioner argues that notice of the completed transfer of title to the Division of Motor Vehicles is also a mandatory requirement of Sect. 46.1-90, Va. Code, 1950, and that title to a motor vehicle will not pas in Virginia until the Division has been notified that the seller has completed the sale by conforming "to the statutory requirement by delivering to the buyer a proper assignment." Aside from the fact that such a construction of the registration act would restrict the business of selling automobiles within the office hours of the Division of Motor Vehicles, the Supreme Court of Appeals of Virginia has decided that notice to the Division is not a condition to the transfer of title to a motor vehicle in Virginia.

In *Nationwide Mutual Ins. Co. v. Cole* (1962), 203 Va. 337, 124 S.E. 2d 203, there was delivery of a properly assigned certificate of title to the buyer by the seller. No notice of the transfer was ever given to the Division by anyone. The Virginia Court decided that title had passed to the buyer and that the seller's insurance policy did not cover the buyer under its omnibus clause as permissive user of the seller's automobile. It is true that the seller in the *Cole Case* was not a dealer and that sellers who are not dealers are not required to give the notice required of dealers by Sect. 46.1-90, Va. Code, 1950 (Peto. App. 21). But, Sect. 46.1-89, Va. Code, 1950,[2] not referred to by petitioner, does require the transferee who is not a dealer to give such notice *immediately*. Sect. 46.1-90, Va. Code, 1950 (Peto. App. 21), exempts dealers from that notice

[2] Sect. 46.1-89, Va. Code, 1950. "The transferee shall write his name and address with pen and ink upon the certificate of title and, except as provided in §46.1-90, shall *immediately* forward the certificate to the Division with an application for the registration of the motor vehicle, trailer or semitrailer and for a certificate of title." (Italics ours)

requirement when they purchase automobiles for resale, but the fact before the court in the *Cole Case* was that no notice of the transfer had been given by the buyer who was not a dealer though required by applicable North Carolina statutes[3] almost identical with Sect. 46.1-89, Va. Code, 1950.

It is significant also that Sect. 46.1-89 requires *immediate* notice of the transfer by the purchaser who is not a dealer while Sect. 46.1-90, exempting the dealer from such requirement when he purchases for resale, specifies no period of time within which the selling dealer shall give such notice.

The District Court, therefore, correctly interpreted Sect. 46.1-90, Va. Code, 1950 (and the Court of Appeals for the Fourth Circuit correctly agreed), when it decided:

> "If transmittal is preceded by reassignment and actual or constructive delivery of the certificate of title to the purchaser, transfer of ownership is not dependant upon receipt of the papers by the Division or the issuance of a new title." (Peto. App. 10).

The pertinent analogy between deeds and certificates of title as the respective muniments of title to real estate and motor vehicles offers further evidence that delivery, either actual or constructive, of a properly executed certificate of title, transfers the ownership of an automobile. In *Payne* v. *Payne*, *supra*, a father expressed in his will the intention to convey certain real estate to his son. Some

[3] General Statutes of North Carolina, Sects. 20-72, 20-73, 20-74, 20-75.

time after the will was executed the father executed the deed conveying the real estate to his son. The deed and will were found together at the father's death. The Supreme Court of Appeals held that there was sufficient delivery of the deed to transfer title notwithstanding that the deed had never left the father's possession.

CONCLUSION

The controversy in this case as to the proper application of local state law to the particular undisputed facts is not only a matter of importance to the parties alone but the Court of Appeals for the Fourth Circuit has correctly interpreted and applied the local law as plainly shown by the decisions of the Supreme Court of Appeals of Virginia. There is nothing in the case calling for this Court to exercise its discretion to grant certiorari.

Richmond, Virginia

Respectfully submitted,

AUBREY R. BOWLES, JR.
H. ARMISTEAD BOYD
901 Mutual Building
Richmond, Virginia 23219

Attorneys for Respondent

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BOWLES, BOYD and HEROD
901 Mutual Building
Richmond, Virginia 23219

Of Counsel